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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1952

No. 536

ROBERT RUSSELL TYRRELL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for
the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Robert Russell Tyrrell, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth

Circuit, entered on November 3, 1952 [C.R. 48]* which judgment affirmed the conviction of petitioner for violating Section 12(a) of the Selective Service Act of 1948 (50 U.S.C.A., App. 462(a)).

OPINION BELOW.

On the date of the submission of this Petition the opinion of the United States Court of Appeals for the Ninth Circuit was not yet officially reported.

JURISDICTION.

1. The judgment of the Court of Appeals was entered on November 3, 1952 [C.R. 48] and the Order denying Petition for Re-Hearing was entered on December 10, 1952. [C.R. 49]. The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

2. The bases upon which it is contended that the Supreme Court has jurisdiction herein, and the cases which support such jurisdiction are, in part, as follows:

(a) Where a Circuit Court of Appeals has rendered a decision in conflict with the applicable decisions of this Court, this Court has juris-

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*References to the Clerk's Record of proceedings in the Court of Appeals for the Ninth Circuit are preceded by the initials "C.R." References to the Reporter's Transcript of the proceedings in the District Court are designated "R.", preceded by the page and followed by the line numbers.

diction on certiorari to review the action of the Circuit Court of Appeals. (Rule 38 of the Rules of the Supreme Court; *Department of Treasury v. Ingram Richardson Manufacturing Co.,* 313 U.S. 252, 85 L. Ed. 1313, 61 S. Ct. 866; *Helvering v. Price,* 309 U.S. 409, 60 S. Ct. 673, 84 L. Ed. 836; *National Licorice Co. v. National Labor Relations Board,* 308 U.S. 535, 60 S. Ct. 108, 84 L. Ed. 451; *Lane v. Wilson,* 305 U.S. 591, 59 S. Ct. 249, 83 L. Ed. 374.)

(b) Certiorari will be granted where a Circuit Court of Appeals has decided an important question of general law in a way probably untenable or in conflict with the weight of authority. (*Postal S.S. Corporation v. El Isleo,* 308 U.S. 378, 60 S. Ct. 332, 84 L. Ed. 335.)

(c) Certiorari will be granted where a Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure of a lower Court as to call for an exercise of this Court's power of supervision. (*United States v. Rizzo,* 297 U.S. 530, 56 S. Ct. 580, 80 L. Ed. 844; *Le Tulle v. Scofield,* 308 U.S. 531, 60 S. Ct. 75, 84 L. Ed. 447; *McNabb v. United States,* 318 U.S. 332, 87 L. Ed. 918.)

(d) A writ of certiorari will issue on the ground of "importance" of the issue presented, or on other grounds similar to those covered by the rule. (*Federal Trade Commission v. Raladam*

Co., 316 U.S. 149, 62 S. Ct. 966, 86 L. Ed. 1336; *Williams v. Jacksonville Terminal Company,* 314 U.S. 590, 62 S. Ct. 64, 86 L. Ed. 476; *National Labor Relations Board v. Express Publishing Company,* 312 U.S. 426, 61 S. Ct. 693, 85 L. Ed. 930; *Sprague v. Ticonic National Bank,* 306 U.S. 623, 59 S. Ct. 463, 83 L. Ed. 1028.)

(e) A writ of certiorari will issue where important constitutional questions are involved. (*Glasser v. United States,* 315 U.S. 60.)

STATEMENT OF MATTERS INVOLVED.

Robert Russell Tyrrell became a member of Christ's Church of the Golden Rule in 1944. He was then fourteen years old. He entered the church with his mother. Since 1944 he had devoted himself exclusively to work and study as a student minister of the church. (250 R 10-23.)

The basic purpose of the Church was to teach its members to apply in every-day living the doctrines and principles of Jesus Christ, who was looked upon as the "Wayshower". (206 R 6-24; Def.'s Exhibit K, 64 R 23 to 65 R 4.) The Church maintained a theological seminary in which young Tyrrell was enrolled. (187 R 10-13; 200R 10-12). The seminary divided its training program for student ministers between study of the ideals and principles of Christ and practical demonstrations of the application of the Golden

Rule in human relationships. (187 R 19-25; 194 R 6-11.) The application phase of the program was the portion which received the heaviest emphasis. (200 R 17-25; 201 R. 1-7.)

To this latter end the Church authorized the establishment of various "projects" under the supervision of ecclesiastical officials known as "project managers". For some two years prior to his indictment Robert Russell Tyrrell had been participating in one of the Church's training projects on a ranch in Oregon. (218 R. 18-25; 210 R 1-6.)

On February 25, 1947, on attaining his eighteenth birthday, petitioner registered pursuant to Selective Service Regulations. (Govt. Exhibit No. 1, 42 R 4-9.) On June 12, 1950 his Selective Service Questionnaire was filed with local board No. 38 in San Francisco, California. (Govt. Exhibit No. 3, 44 R 9-14.) In it he stated he was a full-time student preparing for the ministry under the direction of Christ's Church of the Golden Rule, and was attending a training project at Lakecreek, Oregon. He requested a 4-D classification. On June 20, 1950, the local board classified him in 4-D by a vote of three to zero and sent him a notice of this classification. (48 R 6-13; 90 R 2-22.)

Slightly more than two months later, on August 28, 1950, petitioner's classification was changed from 4-D to 1-A. (49 R 1-4; 90 R 23 to 91 R 4.) The minutes of the local board indicated a notice of this classification was mailed to petitioner on August 29, 1950

(Govt. Exhibit No. 3, 46 R 7-12), although petitioner never received the notice. (223 R 19-21.)

Petitioner's Selective Service file on August 28, 1950, contained the same written information as on June 20, 1950. It was made up of his Selective Service registration card; change of address letter; Selective Service Questionnaire; letter from the Theological Seminary certifying to his full time enrollment as a student minister; a "miniature sermon"; and registrant's statement regarding classification. (66 R 10 to 68 R 21; 339 R 21 to 340 R 7; 343 R 7 to 344 R 10); Govt. Exhibits Nos. 1, 2; (44 R 9-15) 3; Defendant's Exhibits A and B, 68 R 20 to 69 R 19.)

On December 5, 1950, petitioner was sent an order to report for physical examination. (Govt. Exhibit No. 4, 49 R 20 to 50 R 2.) This was his first knowledge of any change from his 4-D classification. (222 R 10-13.) He reported on December 18, 1950, and on being informed of the 1-A classification of August 28, 1950, requested a duplicate notice of classification. (223 R 13-23; Govt. Exhibit No. 5.) After receiving notice of physical acceptability petitioner requested a hearing before the local board. (Govt. Exhibit No. 6, 51 R 17-25.)

The hearing was held on January 8, 1951, before board members Dooley and Bonzani. (325 R 11-17.) Testimony was conflicting concerning some of the events that took place at that time. Petitioner stated the board members, after consulting a list or book, informed him Christ's Church of the Golden Rule was not listed, was not a recognized church, and "could

not be accepted." (227 R 7-18.) Board member Dooley testified he told the petitioner his divinity school was not on the Selective Service list, and further, that that list represented the "recognized divinity schools in the State of California". (328 R 7-25; 330 R 21-23.)

Board member Bonzani said they used the list (Def.'s Exhibit X, 333 R 14-17) to determine if the Theological Seminary of Christ's Church of the Golden Rule was a recognized school. (357 R 6-16.) That he never inquired as to what was considered ministerial training by that church. (358 R 4-9.) That the board simply "follows the list on the recognized schools". (357 R 17 to 358 R 3.)

Petitioner further stated that when he repeatedly attempted to describe the nature and significance of the work he did on the ranch training project—i.e. that it was all part of his studies and was the practical application of the Church's teachings—he was cut short with the reply that anyone on the street could do that. (229 R 1-8; 260 R 2-7; 262 R 1-8; 294 R 3-12.) Board member Dooley confirmed petitioner's efforts to make this explanation. (333 R 23 to 334 R 10.)

Petitioner was queried about the operations of a Church laundry in Petaluma. (229 R 14-23; 262 R 18-25; 263 R 1-5.) Board member Dooley was the attorney for the San Francisco Laundry Owners and the San Francisco Linen Supply Group. (335 R 3-14.) He stated he didn't think much of a church that worked elderly people at a mangle. (263 R 2-14.)

Board member Dooley was the only one who questioned petitioner at the hearing. (350 R 8-12.) It was he who prepared the written summary of the hearing. He stated his notes were made "in case an appeal is taken, the appeal board will understand what our position was." (325 R 24-25, 326 R 1; 345 R 14-18.) The summary described the petitioner as "employed" on a ranch with the "primary occupation" of a "general ranch hand" and "utility worker." There was no mention of petitioner's version of the significance of the ranch work. On the contrary, the summary made an express division between time spent on "church work" and time spent on "ranch work". (Govt. Exhibit No. 7, 53 R 2 to 54 R 4.) Petitioner was not shown, and never saw, the record of the hearing. (232 R 6-15.)

Board member Dooley stated that he considered it his duty as a member of the draft board to determine whether the so-called studies were or were not theological or divinity studies. (338 R 7-11.)

The minutes of action by the local board show an entry on January 8, 1951, "Appeared before board, retained in 1-A," and a notification that petitioner was retained in 1-A was mailed to him on January 9, 1951. (Govt. Exhibit No. 3.) On January 14, 1951, petitioner sent a letter of appeal to the appeal board. (Govt. Exhibit No. 8, 55 R 15-22.) Petitioner's file was forwarded to the appeal board on January 23, 1951. The appeal board affirmed the decision of the local board on February 12, 1951. (Govt. Exhibit No. 9, 58 R 22 to 59 R 3.) An order to report for induc-

tion on March 8, 1951, was mailed to appellant on February 20, 1951. (Govt. Exhibit No. 10, 62 R 1-9.)

At the time petitioner's file was forwarded to the appeal board it contained Govt. Exhibits 2 through 9, and Def's. Exhibits A, B, C, D and E. (69 R 20 to 76 R 2.)

On March 14, 1951, petitioner was indicted for violating Section 12(a) of the Selective Service Act of 1948 (C-5) and on May 14, 1951 was brought to trial. (C-10.)

On May 17, 1951, after the jury had been deliberating for almost 5½ hours, they returned to the courtroom and one of the jurors requested the Court for instructions on the list of recognized divinity schools and asked what would constitute a "recognized organization," because "that was the main issue." The Court avoided the queries. It read its previous instructions from the Selective Service Act and Regulations and told the jury they would "have to be governed by the instructions as a whole." (408 R 17 to 411 R 15.) Thirty minutes later the jury returned with a verdict of guilty. (411 R 23 to 412 R 12.)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. The First Amendment to the United States Constitution, as it relates to the freedom of a church to determine whether a particular phase of its training program is to be deemed a ministerial activity.

2. The Fifth Amendment to the United States Constitution, as it relates to a fair and complete hearing for a Selective Service registrant before his local draft board.

QUESTIONS PRESENTED.

1. In omitting from the written record sent to the appeal board any reference to the religious significance of the ranch work performed by petitioner, and listing his primary occupation as a "general ranch hand" and "utility worker", did the local board act in violation of Selective Service Regulations and the due process guaranty of the Fifth Amendment to the United States Constitution?

2. Where no change appeared in petitioner's file between his classification by the local board in 4-D and his re-classification by the local board into 1-A, was the trial Court in error in concluding as a matter of law that there was a basis in fact for the changed classification, and so charging the jury?

3. In failing to answer questions propounded by a juror during the jury's deliberations, directed to the meaning of an ambiguous term in the Selective Service regulations, and to instruct when requested on a list of "recognized" divinity schools admitted into evidence, did the trial Court commit prejudicial error?

4. May a government agency, a local draft board acting under the Selective Service Act, constitutionally determine whether studies in a church's program of

instruction for the ministry are or are not to be designated as theological studies?

REASONS FOR ALLOWANCE OF WRIT.

A Writ of Certiorari should be issued to review the judgment of the Court of Appeals for the Ninth Circuit for each of the following reasons:

1. The decision of the court below is in conflict with the decisions of this Court in the following cases where similar issues were involved:

Estep v. United States, 327 U.S. 114;
Cox v. United States, 332 U.S. 442;
Bollenbach v. United States, 326 U.S. 607;
Watson v. Jones, 80 U.S. 679.

2. The decision of the court below is in conflict with its own decision in *Morris v. United States* (C.C.A. 9th Cir., 1946), 156 F. (2d) 525.

3. The decision of the court below is in conflict with the following decisions of other circuit courts of appeals where similar issues were involved:

Niznik v. United States (C.A. 6th Cir. 1949), 173 F. (2d) 328;
Smith v. United States (C.C.A. 4th Cir. 1946), 157 F. (2d) 176;
United States v. Zieber (C.C.A. 3rd Cir. 1947), 161 F. (2d) 90.

4. The issues are of grave public importance in that constitutional rights affecting the public are here involved.

CONCLUSION.

For the reasons stated above petitioner prays that his petition for a Writ of Certiorari be granted.

Dated, San Francisco, California,
January 2, 1953.

Respectfully submitted,

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VICTOR E. CAPPA,
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW AND JURISDICTION.

The opinion below was not yet officially reported at the time of the submission of this Petition. The bases of this Court's jurisdiction are set forth in the Petition for Writ of Certiorari.

SPECIFICATION OF ERRORS.

I. The Court below erred in denying petitioner's motion for judgment of acquittal for the reason that a vital part of petitioner's claim for exemption was omitted from the record sent to the appeal board by the local board, depriving petitioner of a full and fair review by the appeal board, and violating directly regulations issued under the Selective Service Act of 1948.

II. The Court below erred in instructing the jury that there was a basis in fact for the change in petitioner's classification from 4-D to 1-A.

The Court charged:

> "I instruct you that the denial to the defendant by the local board and the appeal board of a 4-D classification is final unless it is without basis in fact. The question whether the denial of the local board and the appeal board to the defendant of the classification of 4-D was without basis in fact is a question of law for determination by the Court and not by this jury. The Court has determined that there is a basis in fact for the action of the local board and the appeal board. The Court therefore instructs you as a matter of law that there is a basis in fact for the denial to the defendant by the local board and the appeal board of the classification of 4-D. The Court therefore further instructs you that you are not to consider the matter of the validity of the classification of 1-A accorded the defendant, but you must accept it as valid." (368 R 12 to 369 R 1.)

III. The Court below erred in failing to instruct the jury, when specifically requested by a juror dur-

ing the deliberations of the jury, on the list of divinity schools admitted into evidence, and on the meaning of an ambiguous and material term which had been read to the jury—i.e., what would constitute a "recognized organization" under the Selective Service Act of 1948.

"The Court. * * * *Is there anything that you had in mind that you wished the Court's assistance on?*

Juror Elmore. *The list of schools—what is the instructions on that?*

The Clerk. *Defendant's Exhibit X.*

The Court. *I will send that in to you if you wish.*

The Juror. *Are there any instructions on that?*

Mr. Karesh. Yes, there is an instruction of 4-B that your Honor gave.

The Court. What is it?

Mr. Karesh. That is about ministers.

The Court. Show it to counsel and I will read it to the jury.

Mr. Karesh. This is the instruction that your Honor gave.

The Court. Let counsel read it.

Mr. Karesh. That is from the regulations and the Act that was read to the jury.

Mr. Crittenden. I think——

The Court. Just a moment, not what you think—is that the instruction that you wish? Pass it up and let me read it.

You are instructed that in 4-D shall be placed any registrant: (1) Who is a regular minister of religion;

(2) Who is a duly ordained minister of religion;

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school; or

(4) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction leading to entrance into a recognized theological or divinity school in which he has been pre-enrolled.

Section 16. When used in this Title— * * *

(g) (1) the term 'duly ordained minister of religion' means a person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of doctrines of such church, sect, or organization established on the basis of a community of faith and belief, doctrines and practices of doctrines of such church, sect, or organization and to administer the rites and ceremonies thereof in public worship, and who as his regular and customary vocation preaches and teaches the principles of religion and administers the ordinances of public worship as embodied in the creed or principles of such church, sect, or organization.

(2) The term 'regular minister of religion' means one who as his customary vocation preaches and teaches the principles of religion of a church,

a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister.

(3) The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization.

A Juror. *Can I ask a question?*

The Court. *You may ask any question you wish.*

The Juror. *What would constitute a recognized organization?*

The Court. *Well, you would have to be governed by the instructions as a whole, as the Court has given them to you. Do you have anything else in mind?*

The Juror. *That was the main issue.*

The Court. *You are to act upon the evidence and the instructions as a whole as the Court has given them to you. The jurors may retire."*

(408 R 17 to 411 R 15, emphasis added.)

IV. The Court erred in denying petitioner's motion for judgment of acquittal for the reason that

a government agency may not constitutionally determine whether studies in a church's program of instruction for the ministry are or are not to be designated as theological studies.

ARGUMENT.

I.

THE WRITTEN SUMMARY OF PETITIONER'S PERSONAL HEARING BEFORE THE LOCAL BOARD OMITTED A VITAL PART OF THE HEARING AND DEPRIVED PETITIONER OF A FULL AND FAIR REVIEW BY THE APPEAL BOARD.

It is undisputed that petitioner personally appeared before the local board on January 8, 1951 and informed them of the nature of the training he was receiving in the Theological Seminary of his Church. (229 R 1-8.)

It is undisputed that Board Chairman Dooley prepared the written summary of the personal hearing and that his comments were made "in case an appeal is taken, the Appeal Board will understand what our position was". (345 R 14-18.)

Petitioner repeatedly attempted to emphasize that he was not working merely as a general ranch hand on his Church's project in Oregan, that his activities were actually part of his ministerial training and had special religious significance. (229 R. 1-8; 260 R 2-7; 262 R 1-8; 294 R 3-12; 333 R 23 to 334 R 10.)

Selective Service Regulation 1624.2(b) (Appendix A) permits the registrant at his hearing to direct the

attention of the Board to factors which he believes have not been given sufficient weight. *The regulation then requires the Board to summarize such information in writing.*

Selective Service Regulation 1623.1(b) (Appendix A) makes it imperative that *all* information considered by the local board be summarized in writing and the summary placed in the registrant's file.

Despite this, the summary prepared and forwarded to the Appeal Board, and the *only* information before the Appeal Board as to what transpired at the personal hearing, read as follows:

> "January 8, 1951—Interview with local board Members.
>
> Employed—Paradise Meadow Ranch, P. O. Box 1152, Eagle Point, Oregon.
>
> "Primary occupation: General ranch hand, utility worker, eight hours per day, forty-eight to fifty-six hours per week.
>
> "Compensation alleged to be none, makes purchases for necessities of life from commissary upon requisition approved by manager.
>
> "Attends morning devotional service from 7:00 a.m. to 7:15 a.m. every day. Tuesday night weekly meeting consists of business meeting, ranch problems, and general discussion. Thursday night studies church literature from one hour to one and a half hours. Monday one hour per week attends sermon class. Maximum time given to church work and ranch work in ratio to ranch work one to eight.

"Local Board members after due consideration do not feel justified to grant registrant 4-D classification as per registrants request.

"Registrant to submit further evidence, file to be forwarded to the appeal board when received." (Government's Exhibit 7, R 54-55.)

Rather than presenting a fair and accurate digest of appellant's position this summary expressly distorted it. In point of fact, the local board set down the *opposite* of what had been stated to them by appellant. The prejudice to the registrant arose from the following particulars:

(1) The summary stated the registrant was "employed" at the ranch. This was untrue. No compensation was ever furnished him. There was never any agreement of employment betwen the registrant and his Church. The registrant never occupied an "employee" status.

(2) The summary stated the registrant's *"Primary Occupation"* was that of a *"general ranch hand"* and *"utility worker"*, and that this "occupation" was followed by the registrant 48 to 56 hours weekly. There was not only no mention of the ecclesiastical nature of these activities, but an *express characterization of them as secular work*—a *direct misstatement* of the registrant's remarks at his hearing.

(3) The summary stated the maximum time the registrant gave to "church work" versus "ranch

work" was in the ratio of 1 to 8. This again was an express distortion and misstatement of the registrant's position that *all* of his work was "church work", and not just 6 hours weekly.

With the uncontradicted statement of the local board before it that petitioner was employed as a ranch hand, spending only 6 hours weekly on religious matters, the Appeal Board could reach only one conclusion, viz.: the Petitioner was not a *full-time* student preparing for the ministry. This was the inevitable result of the erroneous statements contained in the summary. Petitioner could not, under Selective Service Regulations, appear in person before the Appeal Board to correct the distortion and omissions of the summary.

The Court of Appeals, in its opinion, conceded that the local board's summary was incomplete when considered alone. But it excused this defection because it found the "substantial equivalent" of the matter missing from the summary and the corrections to the distortions described above in the copy of the Church's Constitution and Canon Laws filed with the Appeal Board. (Defendant's Exhibit K, 64 R 23 to 65 R 4; 200 R 2-9.) It is respectfully submitted the Court's conclusion in this regard is entirely erroneous.

An examination of the Constitution and Canon Laws of Christ's Church of the Golden Rule indicates that nowhere in the passages that relate to student ministers and church projects can there be found the "substantial equivalent" of the missing matter.

(Church Constitution, Article 3; Canon Law #15(3); Canon Law # 22. Appendix B.)

Nowhere is there a correction of the characterization of petitioner as a "ranch hand" who spent only six hours weekly on religious activities. There is no indication anywhere in this material, or elsewhere in the Church's Constitution or Canon Laws, of the number of hours a student minister works, or how much of his time while on a project is deemed ministerial training. The Appeal Board was left with the erroneous and incomplete picture contained in the local board's written summary.

Petitioner was thus deprived of a fair hearing before the Appeal Board. He was entitled to have his case stated *accurately and completely,* in all important respects, to the Appeal Board, which was to judge him solely on the basis of the written record prepared by the local board. The regulation made it "imperative" that a complete written record be forwarded. (Selective Service Regulation 1623.1(b), Appendix A.) This was not done.

The special vice of the Board's failure to act according to the requirements of Selective Service Regulations in this instance was that here compliance with the Regulations was unusually required. Here was an illustration of unorthodox and unconventional theological training, differing sharply from the usual theological curriculum. Here the explanation offered by petitioner was vital for full understanding.

The acts of a local board contrary to the Selective Service Act or its regulations are lawless or beyond its jurisdiction and a classification and order of induction resulting from such acts are void.

Estep v. United States, 327 U.S. 114;
Cox v. United States, 332 U.S. 442.

The omission or distortion of material facts in a registrant's record invalidates the classification of the local board.

Niznick v. United States (C.A. 6th Cir. 1949), 173 F. (2d) 328;;
Smith v. United States (C.C.A. 4th Cir. 1946), 157 F. (2d) 176;
United States v. Zieber (C.C.A. 3rd Cir. 1947), 161 F. (2d) 90.

II.

WHERE NO CHANGE APPEARED IN PETITIONER'S FILE BETWEEN HIS CLASSIFICATION BY THE LOCAL BOARD IN 4-D AND HIS RECLASSIFICATION BY THE LOCAL BOARD INTO 1-A, THE COURT WAS IN ERROR IN CONCLUDING AS A MATTER OF LAW THAT THERE WAS A BASIS IN FACT FOR THE CHANGED CLASSIFICATION, AND SO CHARGING THE JURY.

When petitioner, on June 20, 1951, was classified 4-D, exempt from military training as a student minister, his selective service file contained:

(1) his original registration card;

(2) change of address letter;

(3) his selective service questionnaire;

(4) a letter from the Theological Seminary of Christ's Church of the Golden Rule certifying that petitioner was enrolled as a full time student minister;

(5) a sample sermon written by petitioner during his training;

(6) registrant's statement regarding classification. (66 R 10 to 68 R 21; 339 R 21 to 340 R 7; 343 R 7 to 344 R 10; Govt. Exhibits Nos. 1, 2, 3; Def.'s Exhibits Nos. A, B.)

On August 28, 1950, the local board reopened petitioner's classification and changed it to 1-A, ready for military training. (223 R 24 to 224 R 11.) Between June 20th an August 28th no new facts had come to the attention of the local board, so far as petitioner's file reveals. His position was precisely the same. (66 R 10 to 68 R 21; 339 R 21 to 340 R 7; 343 R 7 to 344 R 10.)

Selective Service Regulation § 1623.1(b) (Appendix A) reads in pertinent part as follows:

> "The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file."

If the local board had determined petitioner's classification on the written information in the file, as §1623.1(b), supra, directed, it would have been compelled to grant the same classification on August 28, 1950, as it did on June 20, 1950. It did not, and

thus acted in the teeth of the regulations. "In all such cases its action would be lawless and beyond its jurisdiction."

Estep v. United States, 327 U.S. 114, 121.

It could not properly consider any facts which had not been reduced to writing. (§1623.1(b), supra.) Since no basis in fact existed for the classification given the registrant the Court was in error in concluding to the contrary as a matter of law and so charging the jury. (368 R 12 to 369 R 1.)

Estep v. United States, supra;

Cox v. United States, 332 U.S. 442.

III.

THE COURT ERRED IN FAILING TO INSTRUCT THE JURY, WHEN SPECIFICALY REQUESTED BY A JUROR DURING THE DELIBERATIONS OF THE JURY, ON THE LIST OF DIVINITY SCHOOLS ADMITTED INTO EVIDENCE, AND ON THE MEANING OF AN AMBIGUOUS AND MATERIAL TERM IN A STATUTE WHICH HAD BEEN READ TO THE JURY—I.E., WHAT WOULD CONSTITUTE A "RECOGNIZED ORGANIZATION" UNDER THE SELECTIVE SERVICE ACT OF 1948.

Petitioner's claim for exemption in Class 4-D was grounded on qualifying as a "student preparing for the ministry under the direction of a recognized church or religious organization, and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school."

Selective Service Act of 1948, U.S.C.A., 50 App. §456(g);

32 *C.F.R.* 1622.19.

A list of divinity schools circulated by California Selective Service Headquarters for the *guidance* of local boards (Def.'s Exhibit X, 333 R 14-17) did not include the theological seminary of petitioner.

The entire list of these California divinity schools was read to the jury by local board member Dooley at the request of the United States Attorney. (329 R 12 to 330 R 20.) He testified that this was a list of the "recognized" California divinity schools. (330 R 21-23.) Board member Bonzani testified the board determined whether petitioner's seminary was a proper divinity school on the basis of the list and stated, "We follow the list on the recognized schools." (357 R 6-16; 358 R 3.) There were frequent references to the list during the trial. (227 R 11-18; 331 R 23 to 333 R 17; 357 R 6 to 358 R 3.)

When a juror requested instructions from the Court on the list, after the jury had been deliberating some five hours, the Court merely read excerpts from the Selective Service Act and regulations which were in no way responsive to the query. (408 R 19 to 411 R 5.)

At the same time the Court was asked what would constitute a "recognized organization" by a juror who said "that was the main issue." It replied the jury would have to be governed by the instruction as a whole. (411 R 6-12.)

Nowhere in the instructions was there a definition or explanation of the term or of the list of schools. The Court had simply read from the Selective Serv-

ice Regulations the description of the 4-D category. (363 R 14 to 364 R 1.) The jury was left with no law applicable to the points which had been raised. The jury returned a verdict of guilty thirty minutes later. (412 R 2-12.)

In criminal cases the Court must instruct on all essentials questions of law involved whether or not the Court is requested to do so.

Thomas v. United States (C.C.A. 6th Cir. 1945), 151 F. (2d) 183;

Morris v. United States (C.C.A. 9th Cir. 1946), 156 F. (2d) 525;

Samuel v. United States (C.A. 9th Cir. 1948), 169 F. (2d) 787.

The issue was particularly important since it undoubtedly permitted, and perhaps persuaded, the jury to infer that *only* those divinity schools on the list circulated by Selective Service Headquarters were recognized, and that petitioner's church was *not* a "recognized organization".

> "The influence of the trial judge on the jury is necessarily and properly of great weight, *Starr v. United States,* 153 U.S. 614, 626, and jurors are ever watchful of the words that fall from him * * * Particularly in a criminal trial, the judge's last word is apt to be the decisive word * * * In criminal cases a conviction ought not to rest on an equivocal direction to the jury on a basic issue * * * When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."
>
> *Bollenbach v. United States,* 326 U.S. 607, 612.

> "Where the instruction or charge of the Court is based upon a statute which is sufficiently clear, the judge may set forth the statute in the instruction, otherwise he should explain it in other language in order that the jury may have a clear understanding of the law before applying it to the facts."
>
> *Morris v. United States* (C.C.A., 9th Cir., 1946), 156 Fed. (2d) 525, 529.

The Court was under a duty to instruct the jury, and especially when directly requested on the meaning of any term which is ambiguous and material to the issues. When a statute or regulations are read to the jury as part of a charge such terms should be explained and defined. The Court's failure to do so seriously prejudiced the defendant.

Douglass and Mandeville v. McCallister, 7 U.S. 298;

Western Coal & Mining Co. v. Greeson, 284 F. 510;

Milwaukee Mechanics Ins. Co. v. Oliver, 139 F. (2d) 405;

Baltimore & O. R. Co. v. Felgenhauer, 168 F. (2d) 12.

Petitioner's failure to comply with Rule 30 of the Federal Rules of Criminal Procedure at the time of trial does not, of course, preclude this Court from noticing an error which seriously affects the rights of petitioner and the integrity of judicial proceedings. Appellate courts may, of their own motion, recognize

this type of error, even though not excepted to during the trial proceedings.

N. Y. Central R. Co. v. Johnson, 279 U.S. 310, 318;

Brasfield v. United States, 272 U.S. 448, 450.

In the instant case, after deliberating five hours, the jury brought to the attention of the trial judge several points which had caused them difficulty. The Court gave non-responsive replies and avoided the points.

> "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy."
>
> *Bollenbach v. United States,* 326 U.S. 607, 612.

The points raised by the jurors' questions were not collateral or trivial. The signifiance of the "recognized" list of divinity schools and what constituted a "recognized" organization was frequently at issue during the trial. There was obviously a conflict in the weight and value sought to be attributed to the list and the so-called "recognized" organizations. The conflict went directly to the vital point of whether the local board had acted arbitrarily and in violation of due process. The trial Court's action left the jury with the inference that the conflict had been resolved in favor of the Government's "official accredited list", and that the local board had acted properly on this point.

IV.

A GOVERNMENT AGENCY MAY NOT CONSTITUTIONALLY DETERMINE WHETHER STUDIES IN A CHURCH'S PROGRAM OF INSTRUCTION FOR THE MINISTRY ARE OR ARE NOT TO BE DESIGNATED AS THEOLOGICAL STUDIES.

The local draft board assumed it was their duty to determine if the studies prescribed by the theological seminary of petitioner's church were to be classified as divinity studies or not. (338 R. 7-11.) Upon the decision they were not to be so classified, petitioner was retained in classification 1-A.

It is petitioner's position this determination was an unconstitutional interference with the freedom of religion guaranteed under the First Amendment.

Petitioner does *not* contend that his opinion, or that of his Church, be deemed *conclusive* on his right to a IV-D, or student minister's classification. That *ultimate fact* is for the local board's determination.

But petitioner does submit that *whether a particular phase of a church's training program is to be deemed a ministerial activity is for the church to determine,* not the draft board. This question is ecclesiastical in its essence. It is a discipline in a form of worship, relating as it does to theological concepts and principles. The state should not have the right to censor such an integral religious matter.

Cantwell v. Connecticut, 310 U.S. 296;
Watson v. Jones, 80 U.S. 679, 727.

Once this determination has been made, i.e., that certain activities of the church membership are properly called ministerial training activities, *then* it is the function of the local boards to determine if the

registrant qualifies under the Selective Service Act for exemption as a student minister. This is the *ultimate fact* which is properly within the province of the local boards. Such questions as whether the registrant is pursuing his schooling (as characterized by the Church) full time, whether he is performing it satisfactorily, and the like, are all legitimate questions for the boards to resolve.

In the instant case, the local board not only determined the *ultimate fact* before it, but moved into the ecclesiastical domain of the Church and passed upon what should or should not be called ministerial training. It concluded that a certain phase of registrant's training should be called "general ranch work". In doing so, it acted in violation of the First Amendment to the United States Constitution.

V.

CONCLUSION.

Petitioner respectfully submits that his petition for a writ of certiorari should be granted on the grounds set forth above.

Dated, San Francisco, California,
January 2, 1953.

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(Appendices A and B Follow.)